

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
PACIFIC COMMUNICATIONS LLC) File No. 0001709518
And CORAL WIRELESS, LLC)
Request for a Waiver and Extension of the)
Broadband PCS Construction Requirements)

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2004

Released: August 16, 2004

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the request ("Request") of Coral Wireless, LLC ("Coral"), the C Block broadband Personal Communications Services licensee for the Honolulu, Hawaii Basic Trading Area, BTA192 ("Honolulu BTA"), for a nine-month extension of its construction deadline under section 24.203(a), and deny Nextel Partners, Inc.'s Petition to Deny the Request.

II. BACKGROUND

2. The Honolulu BTA license was originally granted to American Wireless Group LLC ("AWLG") on September 29, 1999. In December 1999, Pacific contracted to acquire the license from AWLG during the first half of 2000. AWLG, however, subsequently sought to disavow the purchase agreement and, as a consequence, the license became tied up in litigation for an extended period.

3. Pacific filed a lawsuit against AWLG on March 1, 2000 to enforce the purchase agreement, and won a jury verdict on December 29, 2000. AWLG, however, challenged the verdict by

1 The Request was filed by Pacific Communications, LLC ("Pacific"). Coral acquired the license from Pacific. The Commission approved Pacific's application (File No. 50004CWAA04) for consent to assign the License to Coral in a Public Notice released on March 31, 2004. See Report No. 1791, Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, March 31, 2004. The assignment was consummated on May 12, 2004.

2 File No. 0001709518, Request for Extension of Time to Construct and Waiver Request, filed on April 23, 2004 by Pacific Communications, LLC, and amended on May 10, 2004 ("Request").

3 Id. at 1.

4 See Request, Schedule A.

5 Id.

filing a motion for judgment notwithstanding the verdict, to set aside the verdict, or for a new trial. Thereafter, the parties entered into settlement negotiations and a formal mediation process in an attempt to resolve the matter without further litigation. A settlement agreement was reached in September 2002 whereby the license would be assigned to a Trust, with instructions for the Trustee to seek to sell the license to a qualified third party.⁶ The settlement agreement also provided that, in the event of the Trustee's inability to sell the license by October 3, 2003, Pacific would make a cash offer for the license and AWLG was obligated to buy or sell the license at the stated price.

4. The Trustee was unable to find a third party buyer. Pacific made the cash offer contemplated by the settlement agreement on October 10, 2003, and AWLG elected to sell to Pacific on October 17, 2003.⁷ The parties filed an application to assign the license to Pacific on October 20, 2003,⁸ and the Commission approved the application on February 2, 2004. After appearing on Public Notice on February 11, 2004,⁹ the grant became final on March 23, 2004, and the assignment was consummated on March 25, 2004.¹⁰ Subsequently, Pacific filed an application to assign the license to Coral,¹¹ which was consummated on May 12, 2004.

5. On April 23, 2004 and prior to effectuating the assignment to Coral, Pacific filed a request for a nine-month extension of time to satisfy its construction requirements, from September 29, 2004 to June 29, 2005.¹² On May 10, 2004, Pacific filed an amendment to its extension request.¹³ On June 30, 2004, Nextel Partners, Inc. ("Nextel") filed a Petition to Deny the Request.¹⁴ On July 9, 2004, Coral, which had acquired the license, filed a Reply to Nextel's Petition.¹⁵

III. DISCUSSION

6. For the reasons stated below, we conclude that the underlying purpose of the construction requirement would not be served by its strict application in this instance and that a nine-month extension of the construction deadline would be in the public interest. We find that the lengthy litigation and settlement process necessary to obtain the license was the result of causes beyond the control of Pacific and Coral. We note that Coral is prepared to meet the construction requirement by constructing a "bare-bones" system that, while not necessarily meeting prospective customers' needs, would meet the

⁶ See Request at 2. The Commission approved the assignment of the license to the Trust on April 2, 2003. See Report No. 1461, Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, April 2, 2003.

⁷ See Request at 2-3.

⁸ See File No. 0001487713, filed on October 20, 2003.

⁹ Report No. 1739, Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Actions Taken, February 11, 2004.

¹⁰ See Request at 3.

¹¹ See File No. 50004CWAA04. Pursuant to section 24.203(a) of the Commission's rules, 30 MHz broadband PCS licensees are required to provide service to at least one-third of the population of their licensed area within five years of initial license grant. 47 C.F.R. § 24.203(a).

¹² See Request.

¹³ See Letter from James A. Stenger, counsel to Pacific, to Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau (May 10, 2004) ("*May 10th Letter*").

¹⁴ See Petition to Dismiss or Deny (Informal Request) filed by Nextel Partners, Inc. on June 30, 2004 ("*Petition*").

¹⁵ See Reply of Coral Wireless, LLC filed on July 9, 2004 ("*Reply*"). See also n.1 *supra*.

requirements of section 24.203(a) of the Commission's rules.¹⁶ Holding Coral to the original construction deadline would force it to construct a technologically inferior system solely to meet the deadline and preserve the subject license.¹⁷ The public interest and the underlying purpose of the rule will be better served by granting a nine-month extension of time to allow Coral to construct a commercially viable, technologically advanced system, which will put the spectrum to a more competitive and efficient use. Also, the fact that five wireless carriers are currently providing service in the Honolulu BTA persuades us that granting a short extension will not significantly disadvantage consumers.¹⁸ Grant of an extension, moreover, will further our policy to encourage settlement of litigation that encumbers Commission licenses and prevents the use of spectrum.¹⁹

7. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules, a broadband PCS license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of section 24.203, unless the Commission grants an extension request or waives the PCS construction requirements.²⁰ A waiver may be granted, pursuant to section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²¹ An extension of time to complete construction may be granted, pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.²² The Commission, moreover, has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider extending the PCS construction deadlines on a case-by-case basis.²³

8. Pacific states that good cause for a waiver and extension exists because the license was subject to a complex litigation and settlement process, which resulted in its acquiring the license with just six months remaining until the September 29, 2004 five-year construction deadline.²⁴ Pacific states that six months is insufficient to construct a commercially viable system in the Honolulu BTA.²⁵ Pacific

¹⁶ See 47 C.F.R. § 24.203(a).

¹⁷ See 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203(a).

¹⁸ See Request at 4.

¹⁹ See Letter to Stephen Diaz Gavin, Esq., *et al.*, from D'Wana R. Terry, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, 19 FCC Rcd 373 (Jan. 15, 2004) (approving a settlement as in the public interest resolving protracted litigation and enabling spectrum to be put into service); see also Pocket Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 12968 (1998) (granting a waiver to promote successful closure to a settlement process resolving litigation and avoiding further delay in the provision of service to the public).

²⁰ 47 C.F.R. §§ 1.946(c), 1.955(a)(2), and 24.203.

²¹ 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

²² 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

²³ See Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

²⁴ See Extension Request at 1-3.

²⁵ *Id.* at 4-6.

explains that it has developed a plan to offer uniquely priced wireless services to the Honolulu BTA, which is served by five national wireless service providers.²⁶ Pacific states that it will construct a “bare-bones” system by the deadline if the Request is denied, but that this system must be rebuilt with new technology at substantial expense to provide effective competition in the market.²⁷ Pacific contends that such an outcome would not serve the public interest or the underlying purpose of the construction requirement because, rather than promoting competition, it would delay the delivery of advanced wireless services and the accompanying increase in competition in the market.²⁸

9. We reject Nextel’s argument that the Request is unjustified because the decision to construct a system that cannot be completed by the deadline is within Coral’s control and thus does not satisfy sections 1.946(e)(1) and 24.843(b) of the Commission’s rules.²⁹ Coral states that this Request does not merely involve a choice of system design, as in the *Eldorado Order*,³⁰ but that it needs additional time to construct a system that will be viable in the Honolulu BTA, which is now served by national carriers with “mature networks and entrenched operations.”³¹ We are persuaded that the highly competitive nature of the Honolulu BTA necessitates the construction of a state-of-the-art system, which is capable of competing effectively with the incumbent service providers and, as Coral states, that such a system cannot be constructed by the construction deadline.³² Granting a short extension will allow Coral to more efficiently use its spectrum and benefit consumers.³³

10. Nextel argues that the Request is barred by section 1.946(e)(3) of the Commission’s rules, which provides that extension requests will not be granted solely to allow an assignee to complete facilities that the assignor failed to construct.³⁴ Nextel fails to consider the protracted litigation and settlement process necessary to obtain the license.³⁵ Pacific made an offer to purchase the license from the Trust as soon as it was legally able to do so in October 2003. The assignment from the Trust to Pacific could not have taken place any earlier than it did, and is not the type of late-term assignment contemplated by section 1.946(e)(3). The assignment from Pacific to Coral, moreover, was not contingent upon grant of the Request.³⁶

²⁶ *Id.* at 4.

²⁷ *Id.* fn.20.

²⁸ *Id.*

²⁹ 47 C.F.R. §§ 1.946(e)(1), 24.843(b). Essentially, these rules provide that an extension may be granted if the licensee shows that the failure to complete construction is due to causes beyond its control.

³⁰ *See* Petition at 5, citing *In the Matter of Eldorado Communications, LLC, Request for a Waiver and Extension of the Broadband PCS Construction Requirements, Order*, 17 FCC Rcd 26413 (“*Eldorado Order*”) (2002).

³¹ Reply at 3.

³² *See* Reply at 3.

³³ *See May 10th Letter*. We have previously granted extensions in order to allow an assignee to complete facilities that the assignor failed to construct. *See, e.g., Leap Wireless International*, 16 FCC Rcd 18924 (2001); *Monet Mobile Network*, 17 FCC Rcd 6452 (2002).

³⁴ Petition at 5-7, citing 47 C.F.R. § 1.946(e)(3).

³⁵ *See supra* paras. 3 and 4.

³⁶ We also note that Pacific holds a substantial interest in Coral. *See* File No. 50004CWAA04, Application for Assignment of C Block PCS license, Call Sign WPOK568, from Pacific Communications, LLC to Coral Wireless, LLC.

11. Nextel next asserts that case law does not support grant of the Request.³⁷ Nextel has not shown any basis to treat Coral differently from the licensees who were granted extensions in the *American Wireless Order*, *Telecorp PCS Order*, *Magnacom Wireless Order*, and *Leap Wireless Order*.³⁸ Coral, as in *American Wireless*, has taken reasonable steps toward constructing its system and has explained that it cannot order equipment until system configuration is confirmed by securing the appropriate sites and entering into interconnection and backhaul agreements.³⁹ As in *Telecorp PCS*, the system Coral will construct by the proposed extended deadline of June 2005 will greatly exceed the five-year coverage requirement of one-third the population of the market area.⁴⁰ Coral has undertaken many of the same efforts favorably noted in the *Magnacom Wireless Order*, such as determining the technology and equipment to be employed in the system, identifying transmitter sites, and performing market surveys and research.⁴¹ As in *Leap Wireless*, providing Coral a short extension would promote investment in and rapid deployment of new technologies.⁴²

12. Nextel claims that the Request should be denied, citing the *Eldorado Order*.⁴³ However, in that case the petitioner was the original licensee, made little progress towards system construction, claimed that it needed an extension because of a delay caused by its decision to switch from TDMA to GSM technology, and *sought an extension after the construction deadline had passed*.⁴⁴ *Eldorado* is inapplicable because Coral's license was obtained only after protracted litigation and negotiation that consumed all but six months of the five-year buildout period, and the extension request was timely. The record reflects Pacific's diligence to obtain the license as well as its and Coral's efforts to prepare for construction of a PCS system in the Honolulu BTA.⁴⁵ The purpose of our policy of denying extension requests in cases of insufficient diligence is to ensure that spectrum is effectively utilized by preventing licensees from warehousing their spectrum. There is no evidence of spectrum warehousing here.

13. Finally, Nextel argues that the Request does not satisfy the standards for grant of a waiver,⁴⁶ and that granting such an extension request runs counter to the Commission's goals of ensuring PCS service to as many communities as possible and promoting efficient use of the spectrum.⁴⁷ We find

³⁷ Petition at 8-9. See In the Matter of American Wireless, LLC Request for Extension/Waiver of PCS Buildout Requirement, *Memorandum Opinion and Order*, 15 FCC Rcd 11025 (2000) ("*American Wireless Order*"); In the Matter of Telecorp PCS, LLC, Request for Waiver of Section 24.203(a) of the Commission's Rules, *Order*, 16 FCC Rcd 18917 (2001) ("*Telecorp PCS Order*"); In the Matter of Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap up Group, LLC Petition for Waiver and Extension of Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 9535 (2002) ("*Magnacom Wireless Order*"); and In the Matter of Leap Wireless International, Inc. Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (2001) ("*Leap Wireless Order*").

³⁸ *Id.*

³⁹ Reply at 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See 47 U.S.C. § 309(j)(4)(B).

⁴³ Reply at 5. See *Eldorado Order*.

⁴⁴ *Id.*

⁴⁵ Prior to obtaining ownership of the license, Pacific had begun to identify potential antenna sites and equipment vendors. See Request at 1. In addition, Pacific retained consultants to assist in the development of technical, marketing, and implementation plans. See Request, Schedule A.

⁴⁶ Petition at 10-11. See 47 C.F.R. §§ 1.3, 1.925.

⁴⁷ *Id.*

that Coral has satisfied the waiver standard set forth in section 1.925(b)(3)(i).⁴⁸ First, a nine-month extension would enable Coral to deploy advanced technology to use its spectrum more effectively and efficiently, and bring the benefits of increased competition to its market area and therefore serve the public interest. Grant of an extension will also serve the public interest by providing Coral, a small business designated entity (“DE”), an opportunity to serve this market, particularly since other DEs have exited the market.⁴⁹ Further, the underlying purpose of the construction requirement would not be served by its strict application, given the unique circumstances presented here. Pacific did not obtain the license until late in the license term due to causes beyond its control. Denying the Request and having Coral construct a technologically inferior system to meet the deadline would result in an inefficient use of spectrum and thus be contrary to the underlying purpose of the construction requirement.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission’s rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Pacific Communications, LLC on April 23, 2004, IS HEREBY GRANTED to extend the five-year construction deadline for station WPOK568 from September 29, 2004 until June 29, 2005.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

Thomas Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

⁴⁸ See 47 C.F.R. § 1.925(b)(3)(i).

⁴⁹ See Request at 3. See 47 U.S.C. § 309(j)(4)(d) (directing the Commission “to ensure that small businesses ... are given the opportunity to participate in the provision of spectrum-based services”).

⁵⁰ The relief granted herein applies to Coral Wireless, LLC, which acquired the license on May 12, 2004. See n. 1 *supra*.